IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 266/2002

Smt. Pragati Prakash Sawant,
r/o. House No. 111, Mala, Panaji, Goa. ..... Appellant.

V/s.

Shri Prakash Sawant,
r/o. House No. 696, Kaisu,
Badem, Bardez, Goa. ..... Respondent.

Mr. Anthony Rebello, Advocate for the appellant.

Mr. N. N. Sardessai and Ms. Sudha Pai Kir, Advocates for the respondent.

CORAM : P.V. KAKADE, J.
Date of reserving the Judgment :
28.9.2006.

Date of pronouncing the Judgment :
28th November, 2006.

J U D G M E N T :

This appeal is filed by the unsuccessful wife against the Judgment and Order passed by the Civil Judge, Sr. Division at Mapusa in Matrimonial Petition No. 54/99/B decreeing the divorce in favour of the respondent-husband under Articles 4(4) and 4(5) of the Law of Divorce.

2. The respondent-petitioner filed suit for annulment of marriage and alternatively for divorce under various counts, including under Articles 4(1), 4(4) and 4(5) of the Law of Divorce.

3. The facts, in brief, involved in the dispute are thus :

The parties were married on 27/3/91 at Duler-Mapusa, and, their marriage was registered at Entry No. 201. Certificate of marriage is dated 7.5.1991 issued under no.201. After some time of marriage, the petitioner-husband realized that the wife was not conceiving and, therefore, medical assistance was sought for. After examination of both the parties, the petitioner was found normal. However, wife examination revealed that she had undergone termination of pregnancy while she was spinster and during the course of termination, her fallopian tunes were closed and she was not in a position to conceive. This caused lot of mental tortures to the petitioner. The petitioner also found the respondent to be of easy virtue and was having extra marital affairs. In April, 1994, the respondent left the matrimonial home and the petitioner had to file a complaint with the Superintendent of Police and with whose intervention, the respondent was sent to matrimonial home. Assistance of voluntary action bureau was also sought to reconcile the dispute. However, the respondent filed false complaint against the petitioner and in-laws. However, they were acquitted

after trial in Criminal Case No. 199/95/B. Thereafter, the respondent filed maintenance application No.26/95 and obtained maintenance order from the lower Court. It is the case sought to be made out by the petitioner that the respondent never used to cook and also was living in adultery. She was not permitting the petitioner to have sex with her and had abandoned the matrimonial home and had caused mental cruelty to him. Hence, the petition for divorce came to be filed.

The respondent contested the matrimonial petition and challenged the allegations submitting that she was not having any extra-marital relationship with anybody and the allegations made by the petitioners were totally false. In fact, as alleged by the respondent, her mother in law never permitted her to cook and in fact, the petitioner and his mother assaulted her and, therefore, she had to file complaint on 15.6.94 at Mapusa Police Station. However, the matter was settled with the intervention of the Superintendent of Police. She alleged that since she was not keeping good health, she asked the petitioner to take her to a doctor. But the petitioner did not pay any attention and assaulted her and, therefore, she had to stay with her mother. After she recovered, the petitioner did not take her in the matrimonial home and, therefore, she filed criminal complaint on 10.11.94. According to her, she was forced to leave her matrimonial home and, therefore, there was no question of

abandoning her matrimonial home at any time. On such and other grounds, the petition was sought to be dismissed.

3. The learned trial Judge, recorded the evidence of both the parties and on the basis of the evidence, came to the conclusion that the petitioner failed to prove his allegation regarding adultery as contemplated under Article 4(1) of the Law of Divorce. However, it was held that the petitioner succeeded in establishing that he was entitled to seek divorce by virtue of Articles 4(4) and 4(5) of the Law of Divorce, thereby it was held that the respondent-wife was guilty of causing mental cruelty to the petitioner-husband and had abandoned the conjugal domicile for more than three years and, hence, the decree for divorce on these grounds came to be passed. Hence, the appeal.

4. At the outset, it may be noted that we need not deal with the part of the evidence on record which is in respect of the alleged adultery committed by the wife as the learned trial Judge has properly appreciated the evidence and come to the conclusion that the petitioner has failed to prove that the wife was living in adultery. There is no appeal filed against the said finding and, therefore, it has attained finality.

5. That leaves us to deal with the grounds contemplated by Articles 4(4) and 4(5) of the Law of Divorce.

It is an admitted as well evident position that the marriage between the petitioner and the respondent took place on 27.3.1991. It is also clear from the record that the wife left the matrimonial home in the month of April, 1994. The complaint to the Dy.S.P. was made on 30th June, 1994 and the letter of the Advisory Board was dated 12.11.1994. Again the criminal complaint was lodged after 10.11.1994 and, thereafter, criminal cases were filed on 19.1.1995, from 16.2.1994 to 3.11.1994. Evidence on record also shows that the parties have taken medical treatment which establishes that the dispute arose between the parties somewhere in the year 1994. The petitioner has sought to make out a case that the respondent terminated pregnancy before her marriage. She was taken to Dr. Chodankar's hospital, who opined that she will not be able to conceive because of closure of her fallopian tube. The document Exhibits PW.1/E, PW.1/F, and PW.1/G are sufficient to show that from 16.2.1994 to 20.2.1994 the respondent was taking treatment from Dr. Chodankar. Exhibit PW.1/H is the lab report pertaining to the semen analysis of the appellant-husband wherein he was found to be normal. The respondent was medically examined. However, this aspect is denied by the respondent stating that she was not operated in Dr. Chodankar's hospital. In this

regard, the cross examination of the wife is required to be noted. She states that she knows Dr. Chodankar Nursing Home. However, she does not remember how many times she visited the hospital. She also does not remember if she had taken treatment of any other doctor. She further states that she does not know whether the prescription Exhibit PW.1/F was prescribed to her by Dr. Chodankar. Finally she stated that she does not "**remember"** that she was operated upon at Chodankar Nursing Home. She also could not say anything about the post-operative treatment mentioned on the reverse side of Exhibit PW.1/E. She has also refused to acknowledge that Dr. Chodankar after examining her opined that she had undergone operation for termination of pregnancy in her spinsterhood days. This evidence, coupled with other circumstances on record would, in my considered view, be sufficient to show that in all the probability, the wife had undergone operation before marriage for termination of pregnancy which fact is borne out by the documentary evidence on record. However, the wife is quite vehement in denying this aspect.

6. This aspect apart, the entire record as well as the admissions of the wife, show that the respondent-wife filed two cases, one criminal case No.199/95/B alleging that the petitioner and his mother illtreated her from May, 1991 to 10.11.1994 and thereafter, filed maintenance case No.

26/95/B wherein she succeeded in getting the maintenance amount. The criminal case concluded in the year 1999 and the maintenance case was duly disposed of. The respondent wife has admitted that since 1994 onwards she is not staying with the petitioner. It is to be noted that the record is sufficient to show that since the year 1995 wife has engaged her husband and his mother in some type of litigations or the other, making wild allegations which, ultimately, were not established. This conduct, by itself, would show that the husband was subjected to mental cruelty at the hands of his wife. It is well established that cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions and their culture and human values to which they attach importance. The Apex Court has also held in the case of ***Naveen Kohli vs. Neelu Kohli,*** (2006) 4 SCC 558 that each case has to be decided on its own merits. In that case before the Apex Court, the wife got issued public notice in the news paper with a view to lower the prestige of her husband. Both the parties levelled allegations against each other. Both were living separately for more than 10 years and the wife was not prepared to have decree of divorce on mutual consent. In my view, similar situation is arising in the present case and, therefore, I hold that the wife is

guilty of mal-treatment as contemplated by Article 4(4) of the Law of Divorce. In other words, the wife caused mental cruelty to her husband and, therefore, the trial Court has rightly concluded that the respondent-husband is entitled to divorce on this count.

7. Evidently, the wife has left the matrimonial home in the year 1994. The entire record is also sufficient to show that no attempt was made by the wife to reconcile the marriage. The wife has tried to make out a case that she was compelled to reside at her parental home. However, the facts on record tell some other story. In fact, the wife proceeded to file series of criminal proceedings against the husband and his mother, which revealed her intention not to reconcile the matter. It appears that there was an attempt from social welfare body to reconcile the dispute. However, that aspect itself would not show that the wife really desired to reconcile the dispute, especially in view of her conduct to file series of criminal proceedings. The fact remains that the husband and the wife are living separately and there is complete abandonment of conjugal domicile for a period not less than three years which gives rise to invocation of clause (5) of Article 4 of the Divorce Act. Under the circumstances, I hold that the trial Judge rightly has decreed the suit also under Article 4(5) of the Divorce Act.

8. For the reasons recorded above, I hold that the reasoning adopted and the findings recorded by the trial Judge do not call for any interference and ultimately, the appeal is liable to be dismissed and stands dismissed. Under the circumstances, there shall be no order as to costs.

P.V. KAKADE, J.

Ssm.